Nos. 80-5049 and 80-54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD E. CLAYTON, *Petitioner,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL 509,

Respondents.

ITT GILFILLAN, ETC., *Petitioner,*

v.

CLIFFORD E. CLAYTON, *Respondent.*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER CLAYTON

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REPLY BRIEF FOR PETITIONER CLAYTON

In this brief Petitioner Clayton replies to the briefs for Petitioner ITT (ITT Br.) and Respondent UAW (UAW Br.). Space limitations do not permit making answer to the briefs of the Amici Curiae.

STATEMENT OF THE CASE

The reference by UAW to the charges on which Clayton was discharged and the propriety of the UAW action in not arbitrating the grievance (UAW Br. pp. 2-3) are as superfluous as they are gratuitous. The only aspect of this action which was tried to the District Court, the only issue taken to the Court of Appeals and the only is-

sue here, is that dealing with exhaustion of the UAW internal remedies.

I. The Policy Considerations Supporting Clayton's Vindication of the Public Rights and Duties Involved in This § 301 Proceeding Outweigh Those Favoring Labor Arbitration and Exhaustion of Internal Union Remedies.

Clayton seeks "judicial enforcement of his contractual rights" (*Vaca*, 386 U.S. at 185-186) upon the claim that UAW's breach of duty frustrated the arbitration procedure under the collective agreement. He pursues the remedy fashioned in *Vaca* as a substitute for arbitration so as to afford him the hearing he should have had, and now cannot have, in arbitration. He does not "sidestep available grievance procedures in favor of a lawsuit". (UAW Br. 13.) It is the conduct of UAW, not Clayton, that has led the dispute away from arbitration, the common law of the shop and industrial self-government. (See UAW Br. 11-12.)

Clayton's claim does not deal with "purely private contract rights" (UAW Br. 14, n. 36); it is based upon a statutorily declared public right to obtain, and public duty to afford, fair representation to a member of the bargaining unit. He seeks the *Vaca* remedy which is founded upon and designed to enforce the duty of the bargaining agent defined in 29 U.S.C. §159(a). *Humphrey v. Moore*, 375 U.S. 335 (1964); *Steele v. Louisville N.R. Co.*, 323 U.S. 192 (1944).

UAW and ITT urge policies of minimizing judicial intrusion into "industrial self-government" (UAW Br. 15) and of favoring "private dispute resolution" (ITT Br. 22) to make exhaustion mandatory upon the courts in all

§301 actions such as this. The nature of the rights and duties involved requires that before exhaustion be imposed it be shown that the internal remedy is adequate to afford the wronged employee that which he would have had but for the union's breach of duty to him, *i.e.*, his contractual rights.[1] Exhaustion may not, consistent with the national labor policy "relegate an employee to internal union proceedings which cannot provide . . . the relief he seeks". *Chambers v. Local Union No. 639*, 578 F.2d 375, 386 (C.A. D.C., 1978); *Geddes v. Chrysler Corp.*, 608 F.2d 261, 264 (C.A. 6, 1979); *Frederickson v. System Federation*, 436 F.2d 764, 768 (C.A. 9, 1970). Adequacy here means a tribunal whose decision can result in either reinstatement of the employee or reactivation of his grievance. Anything less elevates the objectives of exhaustion to the point of seriously delaying or denying altogether to the aggrieved employee his *Vaca* remedy.

Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (C.A. 3, 1968), held that where the grievance involves the employee-employer relationship, the exhaustion doctrine is inapplicable altogether. That policy should be adopted here. In claiming that *Brady* stands for imposing exhaustion, UAW (Br. 16-17) and ITT (Br. 21) miscite the holding. (See Pet. Op. Br. 36, n. 16.)

Of the cases cited by UAW and ITT in support of an

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[1] Where the internal remedy is deficient in this respect, the aggrieved employee is not required even to initiate the union procedures, for to do so would be an idle act. *Chambers v. Local Union No. 639*, 578 F.2d 375, 386 (C.A. D.C., 1978); *Frederickson v. System Federation No. 114*, 436 F.2d 764, 768-769 (C.A. 9, 1970); *Fruit and Vegetable Packers and Warehousemen's Local 70 v. Morley*, 378 F.2d 738, 745 (C.A. 9, 1967); *Yeager v. C. Schmidt and Sons, Inc.*, 355 F.Supp. 332, 334 (E.D. Pa., 1973).

inflexibly mandatory exhaustion requirement, seven[2] dealt with discharge or some other action where to make the employee whole would require employer action such as reinstatement. In these, non-exhaustion was held a bar to the employee's lawsuit without any analysis of the adequacy of the remedy or the considerations raised in Points III, IV and V of Clayton's Opening Brief. These decisions are not helpful in deciding the issues here. In nine other cases[3] the grievance was remediable with money only and thus presumably within the power of the union adequately to cure. Of these, four[4] explicitly found the union remedy adequate and imposed exhaustion as jurisdictional. Five[5] similarly imposed exhaustion without adequacy having been raised. While the analysis in these opinions is rather thin on the adequacy issue, the approach is clearly one of imposing exhaustion only where the union remedy is adequate to afford the relief sought.

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[2] *Neal v. System Board*, 348 F.2d 722 (C.A. 8, 1965); *Willetts v. Ford Motor Co.*, 583 F.2d 852 (C.A. 6, 1978); *Sherba v. IBT*, 191 L.R.R.M. 2582 (N.D. Ohio, 1979); *Anderson v. Grocers Supply, Inc.*, 483 F.Supp. 73 (S.D. Tex., 1979); *Rehm v. Quaker Oats Co.*, 478 F.Supp. 619 (M.D. Pa., 1979); *Neiger v. Sheet Metal Workers International*, 470 F.Supp. 622 (W.D. Mo., 1979); *Miller v. Local 50*, 468 F.Supp. 193 (D. Neb., 1979).

[3] *Buzzard v. Local Lodge 1040, IAMAU*, 480 F.2d 35 (C.A. 9, 1973); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (C.A. 7, 1978); *Imel v. Zohn Manufacturing Co.*, 481 F.2d 181 (C.A. 10, 1973); *Keppard v. International Harvester*, 581 F.2d 764 (C.A. 9, 1978); *Rainey v. Missouri Utilities Co.*, 596 F.2d 310 (C.A. 8, 1979); *Aldridge v. Ludwig-Honold Mfg. Co.*, 385 F.Supp. 695 (E.D. Pa., 1974); *Kobielnik v. IBT*, 470 F.Supp. 125 (E.D. Pa., 1979); *Pawlak v. IBT*, 444 F.Supp. 807 (M.D. Pa., 1977); *Provencal v. Allegheny Airlines, Inc.*, 383 F.Supp. 159 (D. R.I., 1974).

[4] *Battle, Buzzard, Kobielnik, Pawlak.*

[5] *Imel, Keppard, Aldridge, Rainey* and *Willetts.*

Assuming *arguendo* that adequate relief for Clayton here does not require reinstatement (which is obviously beyond the union's power) and that money damages are an adequate substitute for a job in the case of a Black worker having eight and one-half years of seniority, the UAW tribunals are legally and jurisdictionally incompetent to award money damages until after a judicial determination. Whether the "requisite elements" of breach of duty of fair representation "have been proved is a matter of federal law". *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971). The UAW tribunals have no jurisdiction to pass on questions of federal law. The thought that such a question could be finally determined by a union body thrusts at the very foundation of federal labor law constructed under §301 pursuant to *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). To require that, despite this legal incompetency, the union tribunals must hold their hearings and reach their decisions before the employee may resort to the courts is to impose upon the discharged employee a heavy burden of duplicative litigation.

As a functional matter, the UAW tribunals can fashion no remedy enforcing Clayton's "contractual rights" (*Vaca*, 386 U.S. at 185-186); those rights run against ITT and the UAW tribunals have no jurisdiction over ITT. Only the courts have. Clayton must prove to a court that UAW breached its duty of fair representation and that ITT breached the collective agreement.[6] Any determination on those issues made by a UAW tribunal would have

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[6] Whether the union has any liability to Clayton for its breach of duty separate from liability for "increases" as defined in *Vaca* (386 U.S. at 197-198) is a question not reached here. See *Kaiser v. Local 83*, 577 F.2d 642, 644-645 (C.A. 9, 1978), and compare with *Czosek v. O'Mara*, 397 U.S. 25, 29-30 (1970).

no legal effect in that judicial proceeding. To require resort to the union remedy before proceeding in court is to delay his pursuit of an effective remedy without serving any end consistent with federal labor law.

The benefits claimed by UAW and ITT for the exhaustion requirement are as miniscule as they are speculative. The union's self-reversal for "misconduct of union officials" (UAW Br. p. 17) would not restore Clayton to his job. If exhaustion might convince the employee of the propriety of the union's conduct (UAW Br. p. 17) and thus prevent him from burdening the judicial processes with his suit, a similar salutary result could occur from pre-filing investigation by competent counsel, and discovery proceedings, a stage when the burden on the courts is minimal. UAW does not explicate the extent to which the "factual and contractual picture may well be clarified" (UAW Br. p. 17), but in the employee-employer relationship the factual and contractual issues are not arcane or complex. Interpretation and application of collective bargaining contracts were purposely entrusted to the courts under §301 as part of national labor policy. *Motor Coach Employees v. Lockridge*, 403 U.S. at 300. If the case implicates, at the breach of contract stage, the common law of the shop, it was the conduct of the union that prevented such issues from being tried to the arbitrator.

The consideration that exhaustion promotes union democracy and self-government (UAW Br. p. 18) is not impressive. The ability of the wronged member of the bargaining unit to obtain effective relief is the most productive stimulant to union rectification of its own errors. The policy of enforcing fair representation and preventing the "injustice" (*Vaca*, 386 U.S. at 185-186) of leaving an unfairly represented employee without remedy, in

the circumstances of this case, is of far greater moment to the federal labor policy than the policy of preserving "union autonomy". *Semancik v. United Mine Workers*, 466 F.2d 144, 151 (C.A. 3, 1972).

II. Judicial Discretion Should be Exercised Against Requiring Exhaustion Where the Union Fails in its Burden of Proving That an Effective Remedy is Available Within Four Months.

It is by now settled that the courts have discretion whether to require exhaustion (*NLRB v. Marine Shipbuilding Workers*, 391 U.S. 418 (1968)), and that the "ordinary rule" of exhausting administrative remedies will not be required in actions of this kind. *Czosek v. O'Mara*, 397 U.S. at 27-28. §411(a)(4) applies to any action in any court by the union member. See *Chambers v. Local Unon No. 639*, 578 F.2d 375, 385, n. 12 (C.A., D.C., 1978); *Wigglesworth v. Teamsters Local Union No. 592*, 552 F.2d 1027, 1029, 1031-1032 (C.A. 4, 1976), *cert. den.* 431 U.S. 955; *Ross v. International Bro. of Electric Workers*, 544 F.2d 1022, 1024 (C.A. 9, 1976); *Operating Engineers Local No. 3 v. Burroughs*, 417 F.2d 370, 373 (C.A. 9, 1969).

There remains the question of whether the employee may ignore the union remedy if it fails to give assurance of resulting in an effective remedy within four months or whether he must pursue it for that period whether or not he can achieve a decision in that time. The former alternative is plainly more reasonable. The general rubric against compelling the performance of idle acts[7] applies

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[7] For application of the idle act concept to dispense with the need to resort to a union remedy incapable of affording the relief sought, see note 1, *ante*.

with special force to a discharged worker confronting his union and his employer.

The cases support this proposition. The construction of the statute in *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (C.A. 2, 1961), strongly indicates that the remedy must be capable of producting an effective result within four months.[8] In *Harris v. Int'l Longshoremen's Assoc.*, 321 F.2d 801, 805-806 (C.A. 3, 1963), exhaustion was required because the employee could take his complaint directly to the highest body of the union and get a prompt and final decision. The court stated that it would not promote the statutory purpose to require a member to pursue a union remedy "which could not by its very nature result in a decision" within the four-month period. (*Idem.*) In *Jenkins v. General Motors Corp.*, 364 F.Supp. 302, 308 (D. Del., 1973), the court held that the employee had the option of pursuing the union remedy for four months or showing that the "remedies would be unlikely to produce a decision within a four-month period . . ."

Here the record is replete with evidence that no effective remedy was likely in four months. There are in evidence only two PRB decisions; they award back pay and are dated, respectively, four years and two months, and one year and three months after the incidents complained of. (Pet. Op. Br. pp. 7-8.) In his Opening Brief (pp. 6-7, 25), Petitioner analyzed from the face of the UAW constitution the time periods involved in each stage of the appeal. It is Petitioner's position that the con-

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[8] "Congress has provided a safeguard against abuse by a union of the freedom thus granted it [to settle internal disputes in-house and to exercise corrective action in the interests of judicial economy] by not requiring exhaustion of union remedies if the procedures will exceed four months in duration." (286 F.2d at 79.)

stitution demonstrates that it would have taken Petitioner "at least 105 days" (not "105 days or less" as UAW asserts, Br. p. 20, n. 44) to get to the PRB.[9]

But this computation is subject to considerable lengthening. The IEB is to use only its "best efforts" to decide the appeal to it within 60 days of its receipt by the president. (Jt. Ex. B, Art. 33, §7(c); A. 73.) Nothing in the evidence assures that those efforts will succeed. The president has unlimited discretion to decide appeals himself and without any time constraint whatever.[10] (See Pet. Op. Br. p. 7.) There is no time constraint upon the PRB. (*Idem.*)[11]

The experience of other employees as reported in the decided cases indicates that Clayton's computation of the time required is indeed conservative. In *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 312 (C.A. 6, 1975), the employee had fruitlessly pursued his remedy for 27

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[9] Petitioner's analysis is significantly corroborated by the statement of PRB counsel that the UAW appeals structure is "designed to . . . provide a final adjudication . . . within . . . approximately nine months to a year". (See Pet. Op. Br. pp. 25-26, n. 13.)

[10] ITT contends that the president can expedite the appeal by deciding it himself. (ITT Br. pp. 4, 25.) Nothing in the UAW constitution (Jt. Ex. B., Art. 33; A. 69 to A. 77) contains any reference to expedition of appeal by the president. He is simply authorized to decide appeals himself when he deems it "appropriate". (See Pet. Op. Br. p. 7.)

[11] The trial court and the Court of Appeals were right in regarding the PRB decision as the operative one (623 F.2d at 567; TR. 402/18 to TR. 403/2), because the only evidence offered pertaining to decisions by a UAW tribunal was the two PRB decisions referred to above and further because the constitution makes its determinations final. (Jt. Ex. B, Art. 33, §11; A. 76.) An appeal lies alternatively to the CCAC rather than the PRB. The time required to get to the CCAC is the same as that for getting to the PRB. (See Pet. Op. Br. pp. 6-7.)

months, and in *Maxwell v. UAW*, 489 F.Supp. 745, 749 (C.D. Ill., 1980), the same fruitless pursuit had occurred over 17 months. The court in Maxwell was prompted to observe that "the intra-union remedies here do not meet the 'reasonable' and 'four months durational' limitations of §411(a)(4)". (489 F.Supp. at p. 750, n. 5.)

UAW has the burden of proving adequacy of its own remedy, whether that be the ability of its procedures to award the relief sought (*Fruit and Vegetable Packers*, 378 F.2d at 745; *Yeager*, 355 F.Supp. at 334) or to render an effective decision within four months. The facts pertaining to the time expended from original filing to PRB decision are peculiarly within the knowledge of UAW and not known to Clayton, a rank-and-file worker thousands of miles from UAW headquarters. On considerations of fairness the burden of persuasion will be placed on UAW. (*United States v. N.Y., N.H. and H. R. Co.*, 355 U.S. 253, 256, n. 5 (1957); *Browzin v. Catholic University*, 527 F.2d 843 (C.A., D.C., 1975); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 538 (C.A. D.C., 1975), *rev'd* on other grounds 426 U.S. 290 (1976).) Moreover, UAW pleaded exhaustion as an affirmative defense (A. 18). This, too, places the burden of persuasion on UAW. (*Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (C.A. 1, 1979), *cert. den.* 444 U.S. 186 (1980); *Niccum v. Farmers Coop. Elevator Co.*, 457 F.2d 453, 455 (C.A. 8, 1972); *Marcum v. United States*, 452 F.2d 36, 39 (C.A. 5, 1971).)

III. To Construe the ITT-UAW Agreement to Contain a Commitment to Arbitrate Grievances After Withdrawal by the Bargaining Agent Contravenes the Contract Terms and the Plain Intent of the Parties.

ITT (Br. pp. 33-35) urges an imputed intent to the parties to the collective agreement to reactivate grievances

withdrawn from arbitration when the union tribunal finds the withdrawal to have been a breach of its duty to the employee. This imputation rests upon the employer's presumed knowledge of the union's internal procedures and the awareness of both parties of the federal labor policy favoring arbitration and exhaustion, taken together with the failure of the parties to employ explicit language negativing reactivation.

But here there is uncontradicted evidence that ITT and UAW had an intent not to reactivate such grievances. At trial, it was stipulated that upon the union's withdrawal in this case "it was the end of the road so far as remedies under the contract were concerned". (RT p. 108/19 to 109/7.) Counsel for ITT stated that under the collective agreement the employer had "no obligation whatever" to "reopen the arbitration proceeding" in the event that the UAW appeal went favorably to Clayton's claim of breach of duty. (RT p. 260/17-19.) This evidence taken with the absence of any provision in the collective agreement referring directly or indirectly to reactivation (Jt. Ex. A, Art. IX; A. 35-A. 36) compels the conclusion that ITT has only now discovered this "intent to reactivate".

ITT's position rests upon a distortion and misapplication of *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243 (1977). In that case the Court was required to interpret the scope of an ambiguous arbitration clause. The issue was whether an agreement to arbitrate grievances arising under the collective agreement encompassed disputes arising after its termination but concerning rights which came into being under the contract during its term. As an aid in the task of interpretation and as a means of determining the intent of the parties, the Court presumed that the parties had in mind well-established national labor policy favoring arbitration and requiring that an arbitra-

tion clause be given the broadest scope possible consistent with its actual language. The arbitration clause in *Nolde* spoke of any grievance arising under the contract, and did not specifically negate arbitration of grievances arising under the contract but after its termination. The Court concluded that, in the absence of such specific negation, the parties intended to arbitrate all grievances arising out of the contractual relationship. (430 U.S. at 254, 255.) ITT's contention here, however, requires not the interpretation of an ambiguous provision but the addition to the contract of something that is not there. Under the collective agreement as explicated in the stipulation of the parties referred to above, a grievance withdrawn from arbitration is like a grievance in which arbitration has never been requested. Such a grievance is defunct, dead, *by agreement of the parties.* It is quite unlike the grievance in *Nolde*, which had arisen under the contract and had never been abandoned or otherwise disposed of in accordance with the agreement of the parties.

In *Nolde*, as in *Wiley v. Livingston*, 376 U.S. 543 (1964), the grievance had not been disposed of and only a factor external to the parties' bargaining process impinged upon the employer's obligation to arbitrate it. The Court in those cases interpreted the contract to be unaffected by the external factor. There is no such external factor here. The Court would have to insert in the contract a new clause on the reactivation of abandoned, defunct grievances, giving a new and different result to the parties' bargaining process. In *Nolde* and *Wiley* there was a simple problem of ascertaining the parties' bargain. Here the question is whether to impose a duty to reactivate grievances earlier disposed of, notwithstanding an agreement providing that prior disposition was final. Nor is the reactivation problem merely "procedural" to be decided by an arbitrator. It goes to whether there was an agree-

ment to arbitrate a previously withdrawn grievance, an issue which must be decided by a court. (*United Steel Workers v. Warrior and Gulf Navigation Corp.*, 363 U.S. 574, 582 (1960).) There is no such agreement on the face of the contract. The evidence of intent reviewed at length above shows that the parties specifically intended not to reactivate grievances that had been withdrawn. To attribute to them any other intent is to substitute a court-fashioned agreement for the parties' bargain.

An additional factor bearing upon the parties' intent is the legal position of the employer. Under *Vaca* it is part of the employer's defense to this type of action that the union did not breach its duty of fair representation. (386 U.S. at 186.) It would take an explicit renunciation of that right to attribute to the employer a willingness to surrender that defense by reactivating a grievance that had been abandoned. (*Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956); *NLRB v. Wisconsin Aluminum Foundry Co.*, 440 F.2d 393, 399 (C.A. 7, 1971).)

IV. The UAW is Not an Indispensable Party. The Court of Appeals was Correct in Permitting Clayton to Pursue His Discrete Claim Against ITT Alone.

While *Vaca* held that to pursue his claim against the employer for breach of the collective agreement the employee must prove that his bargaining agent has failed to represent him fairly in handling his grievance (386 U.S. at 186), it also recognized that the employee was free to proceed against the employer in a separate action and prove both elements of his case therein. Whether the union is joined or not, "the situation is not substantially changed". (386 U.S. at 186-187.) The union's breach of duty in failing to press the grievance and the employer's breach of contract are "unrelated". (386 U.S. at 197.) Neither the union nor the employer is liable to the em-

ployee for loss caused by the other; the total loss of the employee is to be apportioned between union and employer according to the fault of each, with the union responsible only for the "increases, if any" occasioned by its failure to press the grievance. (386 U.S. at 197-198.)

In *Czosek v. O'Mara*, 397 U.S. 25 (1970), the claim of the employees against the union for breach of the duty of fair representation was held to be a claim discrete from their remedy against the employer. (397 U.S. at 28.) On the authority of *Vaca*, the union in *Czosek* could not claim prejudice if "separate actions are brought against it and the employer for the portion of the total damages caused by each". (397 U.S. at 29.)

These principles have been applied in the Courts of Appeals. In *De Arroyo v. Sindicato Etc.*, 425 F.2d 281, 286-287 (C.A. 1, 1970), in analyzing, for statute of limitations purposes, the nature of the employee's claim against the union for failure of fair representation, the court observed that under *Vaca* and *Czosek* the employee can sue his employer separately under §301 and there show the union's breach of duty. *Kaiser v. Local No. 83*, 577 F.2d 642 (C.A. 9, 1978), held that the dismissed employer was not an indispensable party to the employee's action against the union; the court's reasoning was that neither the employer nor the union was an indispensable party to the employee's claim against the other. (577 F.2d at 644). The employee's action against the employer and his action against the union were said to be "separate and distinct". (577 F.2d at 645.) On the authority of *Vaca*, the court specifically held that the union could be liable to the employee for breach of its duty to represent him fairly even where the employer is not liable for breach of contract. (*Idem.*)

In cases closer on their facts to the case at bar the courts have held that where the employee's claim against the union had been dismissed, the employee could still proceed on his independent claim of contract breach against the employer. (*Harrison v. Chrysler Corp.*, 558 F.2d 1273 (C.A. 7, 1977); *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182 (C.A. 10, 1978); *Winter v. Local Union No. 639*, 569 F.2d 146 (C.A., D.C., 1978).

In these lights, then, there is no occasion to invoke Civil Rule 19. Clayton can get "complete relief" on his claim that ITT breached the collective agreement. His claim against UAW rests upon its separate and independent conduct. The trial of the claim against ITT involves no "interest" of UAW, and the disposition of it will not "impair or impede" the ability of UAW to protect its interests. For no interest of the UAW in the alleged breach of contract by the employer would in any sense be determined or abridged by a decision of Clayton's claim in that respect. Whether in the interests of judicial economy the claims against ITT and UAW, if asserted in separate actions, should be consolidated is a question not reached here.

Contrary to the assertions of ITT (Br. p. 23), Clayton's claims against it and the UAW cannot be analogized to a tort victim's claims against a servant and his master or against a tortfeasor and his insurer. In such cases there is a single set of operative facts and the liability of the master or the insurer grows out of his relation to the actor. Here there are two separate and distinct sets of operative facts and two separate entities acting independently of each other. (See *Czosek, supra.*)

CONCLUSION

The policy considerations urged by UAW and ITT present so formidable an obstacle to the discharged employee's access to his §301 action as to render it virtually inaccessible. The remedy these parties would have him exhaust offers no viable alternative to this judicial remedy to enforce the employee's contractual rights; the union procedures lack the power to enforce those rights, to do so timely and to interpret and apply federal labor law. The disposal of these matters should be as set out in the Conclusion of Petitioner's Opening Brief, p. 39.

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